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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

CHRISTOPHER GARZA,

Plaintiff,

vs.

CITY OF SALEM, an Oregon municipal  
corporation; and OFFICER DAVID BAKER,  
an individual,

Defendants.

Case No. 3:22-cv-00721-HZ

PLAINTIFF'S RESPONSES TO  
DEFENDANTS' MOTIONS IN LIMINE

In response to Defendants' Motions in Limine, Plaintiff provides the following:

1) Plaintiff agrees there will be no punitive damages arguments raised against the City of Salem, but reserves the right to make permissible arguments concerning the purpose of punitive damages as pertains to the federal claim against Officer Baker.

2) Agreed.

3) Agreed.

4) Plaintiff agrees there will be no argument or testimony concerning use of force by anyone other than Officer Baker. However, any of the communications between Plaintiff and Officer Baker at the scene that mentioned police use of force or other misconduct in the popular consciousness are relevant to the overall interaction between Plaintiff and Defendant Baker.

5) Plaintiff has brought no racial discrimination claim; however, the fact that all three men involved were Hispanic men out of doors late at night in Salem, the fact that Officer Baker decided to use force in this situation, and the amount of force he decided to use, are part of the narrative of the incident. Also, as defendants have announced an intention to argue that Plaintiff's conduct at the scene was the cause of Officer Baker's use of force, Plaintiff's subjective belief at the time that his race was a factor in Officer Baker's demeanor and actions toward him are relevant to rebutting Defendants' argument.

6) If a police officer's conduct violated one or more criminal codes, it should be pointed out to the jury without hesitation.

7) Defendants do not accurately state the limitations for testimony by treating physicians. Treating physicians need not be disclosed as an expert witness so long as their testimony is limited to opinions formed during the course of treatment. *Fricano v. Lane Cnty.*, No. 6:16-CV-01339-MC, 2018 WL 2770643, at \*7 (D. Or. June 8, 2018) (citing *Poyer v. United States*, No. 6:11-CV-03040-AA, 2013 WL 4786485, at \*3 n.3 (D. Or. Sept. 3, 2013)). This includes opinions formed concerning causation. *Sepe v. Gordon Trucking, Inc.*, 755 F. App'x 668, 670 (9th Cir. 2019). Courts have held failure to disclose treating doctors as experts and provide expert reports as harmless where defendants were aware of the witness and had subpoena power over medical records. *Sepe* at 670. Notably, in *Fricano*, the Court held: "Even if Mr. Fricano was required to disclose Dr. Northway as an expert witness, the Court would allow his evaluation into the record because Mr. Fricano produced the evaluation as part of fact

discovery—making the lack of disclosure harmless—and there is no evidence that counsel for Mr. Fricano acted in bad faith. See Fed. R. Civ. P. 37(c)(1). The Court also finds that the evaluation qualifies, at the very least, as a record of a regularly conducted activity, Fed. R. Evid. 803(6), and a statement made for medical diagnosis, Fed. R. Evid. 803(5), taking it outside of the rule against hearsay.” *Fricano* at \*7.

In this case, Plaintiff began producing records from Dr. Tobin more than a year ago, produced a written evaluation detailing Dr. Tobin’s opinions formed during treatment, also more than a year ago, and produced his CV and rate sheet, along with all medical records regarding his treatment, prior to the agreed-upon expert disclosure deadline. There is no harm to defendants from the manner of disclosure in this case.

8) 1. Plaintiff agrees not to raise objective reasonable suspicion or lack thereof at trial. However, whether Officer Baker held a subjective suspicion is relevant to the state law false arrest claim.

2. Plaintiff does not fully understand Defendants’ motion on this point; to the extent defendants are arguing against admission of expert testimony concerning what either party’s actual subjective belief was, plaintiff agrees; however, Plaintiff’s expert should be allowed to testify based on his training and experience with training police officers, that it would be extraordinary, irrational, or contrary to all training for any competent officer with Defendant Baker’s level of training and experience to hold a subjective belief of suspicion under these facts.

3. See 8(1) above.

4. See response to defendants' MIL #6.

Dated this 16th day of October, 2023.

KAFOURY & MCDUGAL

/s/ Jason Kafoury

Jason Kafoury, OSB #091200  
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Of Attorneys for Plaintiff

## CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **PLAINTIFF'S RESPONSES TO DEFENDANTS' MOTIONS IN LIMINE** on the defendant(s) on the date indicated below by the following method:

- ☐ mailing with postage prepaid
- ☐ hand delivery
- ☐ facsimile transmission
- ☐ overnight delivery
- ☒ email

to said person(s) a true copy thereof, addressed to said persons at their last known address(es) and facsimile number(s) as follows:

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*Attorneys for Defendants*

Dated this 16th day of October, 2023.

KAFOURY & MCDUGAL

/s/ Jason Kafoury

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